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FILE COPY

No. 660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

WILLIAM McCRONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
AND FOR WRIT OF MANDAMUS
and Brief

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Filed....., 1939.

....., Clerk.

McKEE PRINTING CO., BUTTE, MONT.

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PETITION FOR WRIT OF CERTIORARI AND FOR WRIT OF MANDAMUS

William McCrone, a native citizen of the United States, respectfully petitions the Supreme Court of the United States that there be granted a Writ of Certiorari to review and reverse a final judgment of the Circuit Court of Appeals for the Ninth Circuit dismissing his appeal without consideration of the merits, and for a writ of mandamus requiring the Honorable the said Circuit Court of Appeals to reinstate his appeal and consider it upon the merits thereof, and he avers:

That his said appeal was dismissed by said Court because the said Circuit Court of Appeals decided (erroneously as McCrone submits) that the proceeding against

him in the United States District Court of Montana was for Civil Contempt; that he had given notice of appeal properly in five days as in criminal appeals provided, yet that the judgment against him being of date in April, 1938, prior to the date for effect of the rules simplifying appellate procedure, he had failed within 90 days after final judgment to petition for an appeal or seek an order of the trial judge granting an appeal from the judgment.

He avers that the proceeding against him in the District Court was for criminal contempt: that he was informed at the outset in the trial court that he was charged with a completed offense, a contempt already committed, by a citation as follows:

"RULE AND ORDER

It appearing to the Court from the affidavit of Paul W. DeFoe, a Special Agent and officer of the Bureau of Internal Revenue of the United States, that William McCrone has disobeyed the order and judgment of this Court of date the 23rd day of April, 1938, and has and does hold the Court, its authority and its said order and judgment in disregard and contempt, and it appearing to the Court that it is proper that a rule and order to show cause be issued as prayed for in said affidavit;

Now, Therefore, It Is Ordered, and this does order, and command, you the said William McCrone to be and appear before the above entitled court at its court room in the Post Office building in the city of Butte, County of Silver Bow, State and District of Montana, on April 27, 1938, at the hour of 2 o'clock P. M., then and there to show cause, if any you have, why you should not be punished for your disobedience of the said order of this court of date April 23, 1938, and for your acts and conduct in

holding this said Court, its authority and its said order in disregard and contempt.

Dated April 26, 1938.

James H. Baldwin
Judge of the above entitled court."

R. 46.

McCrone by Motion to Quash tested the civil nature or not of the proceeding and said motion averred:

"That the rule and order herein, and the application therefore (therefor), are improperly entitled, for that no civil action is pending connected in any way with this proceeding. * * *"

R. 48; R. 49.

Such motion being denied, the Trial Court made the following (to our belief self contradictory) announcement:

"We are not calling him into court on a criminal proceeding, he is merely ordered to appear here to show cause why he should not be punished for contempt for having refused to do what the Court ordered him to do. As I view it there should be some pleading putting in issue the statement or affidavit upon which the power of the Court was set in motion."

R. 58.

"Mr. Maury: The defendant wishes to enter a plea of not guilty."

"The Court: Very well. He may enter a plea of not guilty."

R. 58.

From the minutes:

"Court ordered that plea of not guilty be entered."

R. 7.

Thus petitioner was informed at the outset as required by the Bill of Rights of the *nature of the charge* against him.

And petitioner avers that the nature of the charge, a criminal charge, being established, so he could meet it, the Court had no power to change the nature to a charge for civil contempt; to do so would turn the warning that the Bill of Rights says he must have into a snare for his undoing.

But the District Court thereafter found McCrone actually guilty without using that word, thus keeping the proceeding in its nature criminal—and ordered that McCrone be confined to jail until he answered *not certain questions* but

> "of all matters and facts within his personal knowledge concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. Defoe."
>
> R. 83.

Thus in the final order, 81 R., the District Court finds * * * William McCrone, at the said time and place and before the said officer did not give his testimony to said officer of the matters and facts within his knowledge concerning the subject matter of the inquiry and investigation then being carried on by the said agent and said Paul W. DeFoe. * * * and wilfully and deliberately and wrongfully disobeyed the order and command of this Court, entered on April 23, 1938, * * * (R. .81) and the Court further finds that said Wililam McCrone by his acts and conduct and refusal to obey the said order of this Court, was in defiance and contempt of

this Court and of its said order and of its authority. That the said William McCrone is now in contempt of this Court and its said order and its authority, and has and continues to disobey its said order (R. 82). The Court further finds that the said William McCrone did not * * * show any cause whatsoever * * * why he should not be held in contempt of the above entitled Court (R. 82).

The punishment of this petitioner was that he be committed to the custody of the marshal to be confined in the county jail until he purged himself by obeying the order of April 23, 1938, and give his testimony before Paul W. DeFoe, an officer of the Internal Revenue Bureau, of all matters and facts within his personal knowledge concerning the subject of the inquiry and investigation now being carried on by the said Paul W. DeFoe (We paraphrase for brevity) (R. 83). And thereupon your petitioner was confined on April 28, 1938, in the county jail, designated, until released on bail after May 9, 1938, by an order of the Circuit Court of Appeals (R. 108). He applied to the District Court to be admitted to bail, and the District Court refused to fix bail (R. 14).

Thus McCrone, if he had not been admitted to bail in $7,500.00 by the Circuit Court of Appeals after refusal of bail by the District Court would be in jail for life, or at the pleasure of Mr. DeFoe, because in the entire record it nowhere appears what is "the subject matter of the inquiry and investigation now being carried on by the said Paul W. DeFoe." The subpoena to McCrone in blank requires him "to give testimony in the matter of

the tax liability of the above named person for the years designated." There is no person named. Summons to testify (subpoena) is found R. 26.

And within five days after the order adjudging him in contempt, on May 2, 1938, William McCrone served written notice on the United States District Attorney prosecuting him, and filed the same with the Clerk of the District Court, such notice reciting that he appeals to the Circuit Court of Appeals for the Ninth Circuit. The said notice in all respects complied with Rule 3 for criminal appeals, and such notice was accompanied by Statement of Grounds of Appeals. An Assignment of Errors was also served and filed with the notice of appeal. (87 R. et seq.) (Record was certified up and printed. Briefs were filed. Oral arguments were made in accord with the rules of the Court of Appeals.)

At McCrone's instance, a Bill of Exceptions was settled by the trial judge on May 6, 1938; his order recites that it is full, true, and correct and contains all evidence introduced, proceedings had and exceptions taken, at the trial of said cause. (86 R.)

And McCrone avers that there was never any civil action at law, suit in equity, proceeding in bankruptcy, or any proceeding of any kind of any civil nature in which or connected with which he was subpoenaed or called on by the Court or Mr. DeFoe to testify and that he himself was never a party to any civil proceeding in which he has been asked or ordered by Mr. DeFoe or the Honorable the District Court to testify. He avers that his appeal to the Honorable the Circuit Court of Appeals for the Ninth Circuit has merit and that in the

opinion of his counsel, if such appeal had been considered upon its merits, the action of the Honorable the District Court in finding him in contempt would in law have been reversed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The decision demonstrates that even careful counsel cannot decide confidently when perfecting an appeal from a final judgment in a contempt proceeding such as this whether to do so in five days under Criminal Procedure Rule 3 of this Court or within 90 days under 28 USCA, Sec. 230. There is needed a decision from this Court. Both sets of the rules tend to confuse rather than to simplify and enlighten.

(b) The Circuit Court of Appeals has here rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in a matter the same as involved here except that the Seventh Circuit Court of Appeals decided that the Federal Trade Commission had no power to prosecute for civil contempt while in the case at bar the Ninth Circuit Court of Appeals decides that the Bureau of Internal Revenue has power to prosecute a civil contempt proceeding. (All the duties of each branch are to serve only the United States.)

(c) The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, i. e., prior to the hearing of the cause, in the appellate court, there became effective the Federal Rules of Civil Procedure, which

provide in rule 73 (a) that "a party may appeal from a judgment by filing with the district court a notice of appeal." Rule 86 of the Federal Rules of Procedure, inter alia, provides: "They govern all proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

(d) The Circuit Court of Appeals has decided a question of general law in a way probably untenable and in conflict with the weight of authority: i. e., in holding that this proceeding was for civil contempt and not for criminal contempt when there was never any suit, action or proceeding pending in which any private person (or corporation) was a party. An innovation here arises not permitted to the courts. A new crime is predicated known as "Civil Contempt," arising in a way not previously defined.

(e) The Circuit Court of Appeals has decided a second question of general law in a way probably untenable and in conflict with the weight of authority, i. e., that the nature of the proceeding is determined by the *final order* and not by the information as to the nature of the proceeding given here *at the outset*, and we submit required to be given the accused at the *outset*. When once he has been formally informed by citation (or arraignment) of the nature of the proceeding its nature cannot be changed.

(f) The Court of Appeals has here so far sanctioned by a lower court such a departure from the accepted

and usual course of judicial proceedings, as calls for an exercise of the Supreme Court's power of supervision. i. e., McCrone declined to answer certain questions put by an Internal Revenue Officer on the ground that they would incriminate him "under United States law." The hearing was secret. The trial court thereafter ordered McCrone to appear again before that officer (not in court with the officer) and answer all questions that might be put to him "material to the matter under investigation by that officer," *when no person* is named in the subpoena whose income tax returns were being investigated, or named in any of the proceedings. Even if the order had not been erroneous, even void for uncertainty, it was the judge's duty to permit the hearing in court, where, as "each question was asked, the subject could answer or state his reasons for refusing to answer the Crown's question and the Court could (and would) protect him in his basic rights, if the subject were justified." By no other method can the citizen have protection of the Court in his basic rights. The method pursued required the citizen to surrender in advance all rights not to be a witness against himself at the whim of a ministerial officer in a secret hearing and be in contempt if he honestly erred in his judgment of what was "material" or not, *to an undefined investigation.* There is no statute granting immunity.

(g) After plea of not guilty entered by permission of the Court there was no evidence given against McCrone, except that he testified that he had refused to answer two or three questions because it would "criminate me under United States law." But he was found guilty:

without using that exact word. He was punished—at least it would look like punishment to the Americans who wanted no constitution without a bill of rights. He spent 10 days or more in jail.

WHEREFORE, William McCrone prays that a writ of certiorari issue to the Honorable the Circuit Court of Appeals of the United States for the Ninth Circuit commanding it to certify up the record in this case for review by this Court and that upon such review the judgment of the said Circuit Court of Appeals dismissing the appeal of Wiliam McCrone without consideration of the merits thereof, be reversed and that the said Circuit Court of Appeals be ordered by this Court by its writ of mandamus to restore the said appeal upon its calendar and consider it upon its merits.

WILLIAM McCRONE,
Petitioner.

By Lowndes Maury
of Butte, Montana
Attorney for Petitioner.

A. G. SHONE,
of Butte, Montana
Of Counsel of Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND FOR WRIT OF MANDAMUS

I. The opinions of the courts below:

The opinion of the Circuit Court of Appeals for the Ninth Circuit (100 F. 2d, 322), (R. 110) and the dissenting opinion of Judge Haney (R. 116).

The opinion of the District Court in and for the District of Montana is as yet unreported in any published volume.

II. JURISDICTION

1. The date of the decision and of the judgment of which review is asked is December 13, 1938 (R. 121), and the date of the order denying petition for rehearing is January 16, 1939, (R. 122) and this petition and this brief are served and filed in this Court within 30 days after the order denying the petition for rehearing in accordance with the rules in criminal cases, R. 11 of the Rules of Criminal Procedure.

2. The statutory provision sustaining jurisdiction of this Court is Sec. 347 of Title 28 USCA; Sec. 240, U. S. Judicial Code, as amended by the act of February 13, 1925.

3. A specific claim is advanced and relied on that the Court of Appeals ruling in dismissing the appeal of McCrone without a hearing on the merits as if the appeal were from a judgment punishing the appellant

for civil contempt is erroneous and calls for the assuming of jurisdiction in certiorari by this Court because the act of the trial court was in fact an order in a proceeding for criminal contempt and was appealable under the rule relative to criminal appeals by notice without petition and McCrone followed all of the requirements of the rules as to criminal appeals.

4. Cases believed to sustain jurisdiction of this Court are:

Bessette vs. W. B. Conkey Company, 194 U. S. 324 (wherein this court answered the Circuit Court of Appeals for the Second Circuit that it should review by writ of error a judgment of contempt by a trial court against a person who was not a party to a civil suit pending).

Union Tool Company vs. Wilson, 259 U. S. 107.

III. STATEMENT OF THE CASE

William McCrone was on April 21, 1938, summoned to appear to testify and to produce books in the matter of the tax liability of.....
(that is to say nobody at all), District of Montana, for the year 1932 to 1937, inclusive, and no books and papers were mentioned. The summons was signed by Paul W. DeFoe, a special agent. (R. 27.)

He appeared before the agent and refused to testify.

A motion was made in the United States District Court of Montana by the Assistant Attorney of the United States in and for the District of Montana, for a rule for McCrone to show cause why he should not be compelled to testify. (R. 27.)

McCrone answered that he had expressed a willingness to testify as to any matter, the answer to which would not incriminate him or have a tendency to incriminate, and he expressed the willingness to appear again before Paul W. DeFoe (R. 27). The Court made an order on April 23, 1938, that McCrone appear at an hour named on the 23rd day of April, 1938, before DeFoe, an agent and officer of the Internal Revenue Bureau, and testify of all matters and facts within your knowledge and "concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. DeFoe, as such officer and agent." (R. 31.) No other designation of what inquiry or investigation was going on appears anywhere in the record. McCrone appeared before Mr. DeFoe and on being asked certain questions, answered that he would not answer, that it would tend to "criminate me." "I will not be a witness against myself." (45 R.)

On April 26, the Court issued a rule and order stating that it appeared from affidavit of DeFoe that McCrone has disobeyed the order and judgment of date, April 23, 1938, and does hold the Court and its judgment in contempt. The Court ordered McCrone to appear "to show cause, if any you have, why you should not be punished for your disobedience of the said order of this Court of of date, April 23, 1938, and for your acts and conduct in holding this Court its authority and its said order in disregard and contempt." (R. 46.)

McCrone made motion to quash (47 R). In this motion he announced that no civil action is pending connected in any way with this proceeding (48 R). This was overruled and McCrone plead not guilty (58 R., 6 R).

Thereupon the trial court on April 28, 1938, ordered McCrone committed to the custody of the marshal and to be confined in jail until the said McCrone purges himself by obeying the order of April 23, and giving testimony before DeFoe of all matters and facts within his personal knowledge concerning the subject matter of the inquiry and investigation now being carried on by DeFoe. (83 R.)

There was still no more certainty as to what investigation was meant.

This was after a finding by the Court that McCrone wilfully, deliberately, and wrongfully disobeyed the order and refused and neglected to give his testimony and that McCrone was in defiance and contempt of this Court and of its said order and of its authoirty. (R. 82.)

On request the trial court refused to fix bail. McCrone's counsel announced a purpose to appeal or seek some appropriate review of the proceeding of the Circuit Court of Appeals. The trial court said: "There will be no bail fixed. This is a civil proceeding. It has none of the elements of a criminal action." (R. 85.)

A Bill of Exceptions was duly settled. (86 R.) Within five days thereafter, notice of appeal was served and filed (R. 2). Assignment of errors was served and filed (R. 87).

The Circuit Court of Appeals admitted McCrone to bail over the objections of the United States on May 9, 1938, in the sum of $7,500.00 (108 R.). He is at liberty on bail.

The appeal was argued September 22, 1938 (109 R.). The opinion of the Court is found 110 R. The appeal

was dismissed. The dissenting opinion of Circuit Judge Haney is found 116 R.

Petition for rehearing was filed January 11, 1939, "and within time allowed therefor, by rule of Court" (122 R.). It was denied on January 16, 1939. There was an order staying issuance of the mandate until February 16, 1939, and in the event of a petition for writ of certiorari being docketed before such time the mandate shall be further stayed until the Supreme Court passes upon the petition.

IV. SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that the proceeding in the trial court here was for civil contempt and not for criminal contempt and erred in holding that the appeal should have been taken by a petition, citation, and should, of the trial judge have an order of allowance of the said appeal.

(2) The Circuit Court of Appeals erred in holding that, as the appeal was heard six days after the new rules became effective, they should not have been decided by the new rules and all effect given to them, for under the new rules only notice of appeal was necessary.

V. ARGUMENT

The proceeding in the trial court cannot be legally classified as civil contempt. In their official capacities Special Agents of the Bureau of Internal Revenue have no powers to serve any private person. Their duties are confined to serving the United States. No private person has any rights for the special agent to concern himself about. Any attempt on his part to serve any private

litigant would be an illegal deviation from his line of duty. He himself cannot become a *party to any litigation* in his official capacity. There was no party adversary to McCrone in the trial court but the United States. Had McCrone attempted to perfect an appeal as from a judgment finding him guilty of civil contempt, his attempt would have been abortive because there was no private person in existence on whom to serve his petition for or citation on appeal. Declaratory judgments may be obtained. Declaratory appeals are not yet permitted.

If this exact case should arise again and the new rules were not in effect, and we should attempt to appeal by petition and citation, the appeal would necessarily be dismissed because of lack of a civil party adversary to the appeal. Citation could be served on the United States District Attorney. He would answer that he represented only the United States; no private party.

Everything about the proceeding in the trial court seems illogical if one tries to view it as a civil proceeding. McCrone was not a party to any civil case, proceeding in bankruptcy, etc. No case or proceeding of a civil nature was pending in any court. The United States District Attorney by deputy was prosecuting as an officer of the United States. The citation to McCrone was that he show cause why he should not be punished for a completed offense named in the citation (R. 46). He pleads not guilty (7 R.) He is placed in jeopardy. He himself put in a few sentences of testimony. He was actually found guilty: by the careful selection of synonyms to express the meaning and refraining from using the exact word. He was punished. He served 10 or more days in

jail after admission to bail was denied. In the case of Gompers v. Buck Stove Co., 221 U. S. 418, the Court held that when the civil case ended, thereby any order punishing for civil contempt ipso facto was dissolved. Unless McCrone decided to abandon to judicial force his rights not to be made a witness against himself, he is in for life, because there has not been begun any civil case or proceeding which may come to an end. Only the Government of the United States had any concern in the matter. We have searched in vain for any case where without a civil case or proceeding pending any court ever held a person guilty of civil contempt. This is an innovation and a dangerous one. Would the bond in a civil appeal run to DeFoe?

We think the learned Court of Appeals erred, and then proceeded to an erroneous decision, in the following sentence:

> "It has been held that for the purposes of review, the form of the order determines the character of the proceeding."
>
> R. 113.

That court must mean "nature" by the word "character." The rights of man, not the rights of courts, were to be protected by the Bill of Rights. While there is no express statement in the Sixth Amendment that the information as to the nature of the proceeding must be given the accused "at the outset," yet it appears before the words "to have witnesses for his defense." It has been consistently held that arraignment at the outset is of the essence and that the nature once asserted cannot

be changed, i. e., if arraigned for assault and battery, the nature of the proceeding could not be changed by a judgment for civil damages in favor of the victim of the assault or an injunction not to repeat the offense. An appeal from such would be an appeal under the rules for criminal cases.

In every of the four cases cited (R. 114) in support of its theorem by the Court of Appeals there was a suit or proceeding pending between private litigants, or some judgment to be enforced for a private litigant. For the benefit of such a party the order had been made punishing for contempt. But of course that had to be. No case can be found punishing or holding guilty of civil contempt without a civil case or proceeding or a civil judgment to be enforced out of which the contempt proceeding originated—except the case at bar. At least we have made careful search—and none has been cited by government counsel. Criminal contempt is of the rule: civil contempt an exception. It may be easy for a proceeding started under the exception to break over to the rule by a judgment that part of the fine be paid to the United States. Much confusion has arisen, however, by permitting this.

In Wilson v. Byron Jackson Co., 93 Fed. 2d 577 (C. C. A. 9th), a proceeding was begun as for civil contempt. There were two fines, one of $125 for violation of the court's order (in a civil case) and a remedial fine of $1,044. Counsel appealed by procedure for civil appeals, but failed to appeal within five days as required by the rules for criminal appeals. The appeal was dismissed, December, 1937.

We are unkind enough to assert that if McCrone had neglected for five days to take his appeal but had attempted to pursue the method for civil appeals the Government counsel would have moved to dismiss the appeal because it had not met the requirements for criminal appeals.

There would have been cited in support of the motion Wilson v. Byron Jackson Co., (C. C. A. 9) 93 Fed. 2nd 577. The proceeding in that case had less resemblance to criminal contempt than the one at bar. That proceeding for contempt was to fortify a civil judgment of one private person against another. Nothing like that exists here. That contempt proceeding was prosecuted by private counsel. This is prosecuted by the District Attorney of the United States acting (at least de facto) by virtue of his office. That judgment provided for payment of $125 to the government. This demands that he surrender to the government in a secret hearing a right guaranteed him.

McCrone's counsel do not seek to justify or extenuate their work through oversight or forgetfulness or accident in pursuing the method of criminal appeals. The Court of Appeals is justified in saying, "Indeed appellant does not contend that there was anything equivalent to an application for and allowance of an appeal. * * *" (R. 116). Nor did we expect in April any benefit of the contingency that the hearing of the appeal would take place after September 16th, when the new rules would be in effect. If wrong, it is due not to carelessness but to a judicial confusion of the entire subject. We cannot get the same answer as the Court of Appeals to the

question of what is a civil and what a criminal case. Outside of law schools, and law books, the ordinary man, "who is held to know all the law," would believe that, if after a hearing in a United States Court prosecuted by the United States District Attorney, at the instance of a Revenue Officer, a judgment is rendered by virtue of which the Marshal confines him in jail (and when no neighbor or citizen charged him with infraction of his civil rights), he had been through a criminal case.

When the subpoena without names is considered seriously, when it is seen from itself that the person summoned may be forced to bring with him any books, papers, etc., wished by the special agent. If the hearing may be had as here it was had, secretly, out of the presence of a judicial officer to protect the witness in his various basic rights. When there is no immunity statute. Does it not permit to be done thus in secret by undue influence and threat of "civil contempt" punishment, many things that courts of the United States will not and cannot permit to be done in their presence?

There are essential differences, at least in the procedure, between civil contempt and criminal contempt. Instances arise where results to the accused for civil contempt are more serious than for criminal contempt. According to the view held by the trial judge here, the offense of civil contempt is so serious that admission to bail pending appeal should be denied. No bond is required on appeal from a judgment for criminal contempt. In tempering punishment for criminal contempt a court must remember that cruel and unusual punishment must be omitted. Bail in $7,500 ordered here, which for this alleged offense,

might have been deemed excessive in 1789, may not be fixed at $75,000, we will say. An affidavit ex parte seems enough on a charge of civil contempt to shift the burden of proof to the accused, if the view of the trial judge here was the correct one. It certainly cannot be enough on a charge of criminal contempt. There the accused must be confronted with the witnesses against him.

Because:

> "The only substantial difference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is the violation of a decree and the other the violation of a law. * * * These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved, that in the early law they were punished only by the usual criminal procedure, * * * and that at least in England it seems that they still may be and preferably are tried in that way."
>
> United States v. Goldman, 277 U. S. 228.

A plea of former jeopardy would not be heard to deprive a civil litigant party of his rights on a second petition, to an order for civil contempt against his adversary. Circumstances can arise where it is a valid plea in a prosecution for criminal contempt. No Federal statute of limitation exists to bar a petition, of an aggrieved party to a suit, for punishment of his adversary

for civil contempt. But of course the end of the strife between private litigants and satisfaction of judgment marks the end of prosecution or punishment for civil contempt.

Gompers v. Buck Stove Co., 221 U. S. 418.

Statutes exist limiting prosecutions for criminal contempts.

Some of our statements may seem so obvious that the Court may subconsciously resent our making them here. But we were not sufficiently perspicuous in the Court of Appeals.

The only motion in the Court of Appeals to dismiss the appeal was by oral argument of the Government's counsel at the regular hearing of the appeal. Perhaps our strategy was faulty or entirely lacking in not seeking to answer the motion by printed argument. We did state our position and cite cases in petition for rehearing. The petition was denied.

We think that it is as impossible to conceive of a proceeding for civil contempt when there is no cause or proceeding before a court in which private citizens have rights, as it is "to present the play of Hamlet with no actor to impersonate the Gloomy Dane."

The Circuit Court of Appeals of the Seventh Circuit thinks there is a still further limit to prosecutions for civil contempt than the absence of a civil suit or proceeding. It seems to hold that even though there be a suit pending or judgment unsatisfied in which private litigants have financial interest, yet a governmental bureau, i. e., Federal Trade Commission, therein has no right to prosecute for civil contempt.

"In reply to respondents' motions to dismiss, petitioner, the Commission, stated that its proceeding was one for civil contempt, and that it was a part of a proceeding based upon Section 5 of the Federal Trade Commission Act, 15 U.S.C.A., Sec. 45, which provides for a civil proceeding only and for a decree in the nature of an injunction; that it was not punitive; that it was wholly remedial, being prosecuted in the public interest; and that it was ancillary to the main case and in aid of the enforcement of the decree of this court."

Federal Trade Commission v. A. McLean & Son, 94 Fed. 2d, p. 802.

"The Commission thus asserted its right, as a party injured by violation of a decree in its favor, to the remedy or relief afforded by means of civil contempt proceedings. As we studied the questions presented by the petitions and briefs filed prior to the hearing, and by the oral argument on hearing of the motions to dismiss, we concluded that the Commission was not entitled to the relief sought, by the means sought. It appeared that the question of the right of an administrative board, an agency of the Government, created principally for the purpose of regulating competition, to invoke rights customarily accorded to private litigants, had not previously been raised nor settled. Since the procedure followed was that employed in proceedings for civil contempt, according to the rules laid down in Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 S. C. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874, and the Commission treated it as such in its petition and briefs, we concluded that the first question before us was whether the Commission was entitled to institute proceedings for civil contempt as a part of its civil proceedings against the respondents which had culminated in an order of this court to enforce the cease and desist order of the Commission. Having found that the protection of private rights was emphasized throughout the cases relating to civil contempt proceedings

as their principal purpose, we became convinced that the Commission, an agency of the Government, representing no private interest of its own, but acting solely in the public interest, had no such standing as a private party that it could utilize procedure intended to safeguard the rights and interests of private parties. That the Commission does act in the public interest alone we think there can be no question."

Federal Trade Commission v. A. McLean & Son, 94 Fed. 2d, p. 802.

"We consider this fact of importance for the reason that it has been generally held that the party against whom such proceedings are attempted to be had is entitled to know from the outset whether the proceedings against him are civil or criminal in their nature. The Court of Appeals for the Second Circuit discussed this in McCann v. New York Stock Exchange, 80 F. 2d, 211, 214, an appeal from an order fining appellant for contempt of court. In reversing the order, the court said:

" 'Nor can we affirm it as punishment for a criminal contempt. The lower federal courts have not been very clear about the proper practice in such applications since Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874. It has been their custom to determine their character, whether civil or criminal, by resort to a number of elements, some purely formal, some substantial; such as the title of the proceeding, whether costs were demanded, whether the parties were examined, who conducted the prosecution. * * * The result of all this has been most unsatisfactory and has defeated its own purpose, which was to advise the respondent at the outset of the nature of the application. * * * Criminal prosecutions, that is, those which result in a punishment, vindictive as opposed to remedial, are prosecuted either by the United States or by the court to assert its authority. * * *' "

Federal Trade Commission v. A. McLean & Son, 94 Fed. 2d, p. 802.

> "Proceedings for contempts are of two classes—those prosecuted to preserve the power, and vindicate the dignity, of the court, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."
>
> Bessette v. W. B. Conkey Co., 194 U. S., p. 324.

McCrone is a mighty obscure citizen to be invoking the aid of this Court. So situated once, now immortalized, was:

> "Some village Hampden that with dauntless breast
> The little tyrant of his fields withstood."

We apologize for using a slang expression, no other as fit comes to mind; "The Third Degree" method has deserved the grave attention of the American Bar Association.

McCrone's hearing was secret. He asked the Court to allow a stenographer of his own choice to be present at the hearing before Mr. DeFoe; to no result. (28 R.)

No counsel was permitted to enter the Star Chamber with him. (48 R.)

Neither the order nor the subpoena defined or even suggested what investigation was going on. Such hearings when a witness claims his rights not to answer can rightly be continued only in court. Then the witness

can have a decision as to his rights before he gives them up under fear of being in unintentional contempt.

It is a wretched subterfuge to argue on behalf of the Government that the entire proceeding in the trial court was void any way: that he was required to answer only "material questions" to an undefined investigation, i. e., to no investigation at all: that he could not be in contempt because no particular question can legally be held to be material to an undefined subject.

An examination for a similar purpose as the one at bar appears in: In re Doyle, 42 Fed. 2nd, 686. This took place in open court. Some of Doyle's objections were sustained. Some were overruled. Questions almost identical were asked Doyle that were asked McCrone. On appeal from commitment, this was reversed without opinion—per curiam. United States v. Doyle, 47 F. 2nd, 1086.

Doyle was permitted to lay his objections before a judicial, rather than exclusively before a ministerial officer.

Of course we think that McCrone's appeal should have been held a valid one by the advent, before any oral motion to dismiss at the hearing, of the date for effectiveness of the New Rules. But we cannot improve on the able reasoning of Judge Haney, set out in his dissenting opinion (R. 116).

Many public spirited lawyers believe the National Government is assuming powers not permitted by the Bill of Rights. Many public spirited lawyers believe the National Government is not exercising all, but should exercise more, of the powers permitted it. Most public spirited people

see the need of laying out clear lines of limitation. Bills of Rights are worn away, little by little, against people who endure wrong, rather than lay out the expense of a contest. Finally acts of government long endured without protest become customary; custom becomes law. Obsolescence of basic rights is as destructive as violent open attack.

Certiorari and Mandamus should be granted.

Respectfully submitted,

Lounder Maury

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